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Supreme Court of the United States

OCTOBER TERM, 1968

No. 314

CLIFFORD H. RAY, Petitioner,

v.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

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Supreme Court of the United States

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No. _____

CLIFFORD H. RAY, Petitioner,

v.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

Petitioner, Clifford H. Ray, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, First District, affirming the summary final judgment entered for respondent by the Circuit Court for the Eighth Judicial Circuit of Florida under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51, et seq.

OPINIONS BELOW

The opinion of the First District Court of Appeal is reported at 205 So. 2d 537 and is set out in Appendix A. The

order of the Supreme Court of Florida of May 3, 1968, denying certiorari, with one justice dissenting, is unreported and is set out in Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Did the Florida appellate court err in holding that in an action under the F.E.L.A. an injured railroad employee was not entitled to go to the jury as a matter of law, where the record showed:

Plaintiff, an inspection foreman, while riding an inspection motorcar in the course of his employment was seriously injured when the motorcar struck a dog and derailed, throwing the plaintiff onto the tracks; the plaintiff, in his deposition, testified that he could not reach the back handrail because it was too far back; that he received bruises on both hands; the affidavits relied upon by the defendant in its motion for summary judgment were those of an employee of the defendant and an employee of the manufacturer of the motorcar in question; one of such affidavits never gave an opinion as to the safeness of the motorcar, and the other stated a conclusionary opinion that the motorcar ". . . is designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices are installed . . .", but the affidavit failed to mention the lack of side handrails and a seat belt for the operator, and neither of such affidavits explained how or why the operator was thrown from the car?

STATUTE INVOLVED

The pertinent Section of the F.E.L.A., 45 U.S.C. Sec. 51, is set out in Appendix C.

STATEMENT

The plaintiff sued the defendant under the F.E.L.A. alleging that defendant negligently furnished plaintiff a dangerous and unsafe place on which to work and failed to provide plaintiff with a reasonably safe place to work and sufficient and proper equipment including handrails and other safety devices.

On May 3, 1962, plaintiff was employed by the railroad as a section foreman, and as part of his normal duties, was riding a motorcar over the railroad tracks inspecting the tracks. (R. 27-29) The motorcar was traveling in a southerly direction and plaintiff was seated on the left rear side facing south. (R. 31-32) Plaintiff was primarily engaged with the operation of the car, and two other employees who were riding on the front of the car were engaged in inspecting the tracks. (R. 32) The controls on the car are located in the center which is merely a bed across the top. (R. 31) Plaintiff was seated in the seat provided for the operator, which was a small board extending out from the top of the box. (R. 31) The only handrails on the car were one in the front which extended the entire width of the car, about 56 inches, and a small one in the back which extended only a portion of the width of the car, or about 20 inches. (R. 30-31)

Just after the car passed over a road crossing and while plaintiff was operating the control levers, he felt the car shudder. At that time the car struck a dog, immediately raised up on the high or west side of the track, causing the

car to jump out from under the plaintiff, dropping him on the lower or east rail of the track. (R. 34-36). The car continued to roll on off the track, and the two men who were riding on the front of it where the handrail extended the entire width of the car were not thrown off. (R. 40-63)

At the time plaintiff felt the impact, he was using both hands in operating the controls. With regard to his being able to hold onto a hand rail, the record shows the following:

> "Q. At the time that you felt the shuddering, could you describe for me what you were holding on to?
>
> A. Had my hand on the brake--had bruises all over on my hand there.
>
> Q. You have indicated that you had your right hand on the brake, so what was your left hand on--did you have hold of the back rail that's provided?
>
> A. *Can't reach back there, in other words, too far back.*
>
> Q. And as you sat in the seat you were facing south?
>
> A. Yes.
>
> Q. Do you recall where your left hand was?
>
> A. There was a bruise on my wrist, I evidently must have been reaching for the throttle with it, because it was--or taking it out of gear, one, because you have to use both of the, you work both of them." (R. 37) (Emphasis supplied).

L. E. Conner, in his affidavit which was attached to the railroad's Motion for Summary Judgment, states that he has been employed by Seaboard for more than 20 years and is

Supervisor for Work Equipment for the company. He recommends to the management the type and design of all motorcars which are purchased. (R. 11) He has examined the photographs which were attached to plaintiff's deposition and identifies the car as being purchased from the manufacturer, Fairmont Railway Motors, Inc. He gives the history of the particular car subsequent to its purchase by Seaboard, and further, says that Seaboard has used numerous such motorcars. (R. 12-13) He knows of five concerns which manufacture motorcars and Fairmont is the largest manufacturer of such cars in the nation. He concludes with his opinion that the Fairmont motorcars are the best designed and the most efficient motorcars produced in the country. (R. 13-14) He never states that the cars are safely designed or have sufficient safety devices on them.

Neil J. McDonald, in his affidavit, states that he is Chief Engineer of Fairmont Railway Motors, Inc., and has been employed by Fairmont for a number of years in various capacities. He belongs to numerous societies and has delivered papers in the general area of his profession. (R. 15-16) From the pictures attached to plaintiff's deposition he identified the car as one being manufactured by Fairmont and sold to Seaboard. (R. 17)

Affiant personally participated in the engineering studies leading to the design and manufacture of the car, and it was designed in accordance with and in conformity to the well-accepted tried and tested sound engineering design principles; in accordance with accepted and standard safety principles; and in accordance with requirements of the various railroads who use the cars. (R. 17)

Fairmont also manufactures gang cars which are larger than the inspection cars, and these gang cars have safety

rails fore and aft which extend the entire width of the car, whereas on the inspection car the rear safety rail only extends for the width of the seat box or housing seat, rather than the entire width of the car. (R. 18)

Both fore and aft safety rails on the model car in question are designed and placed upon the car for the purpose of giving passengers and the operator a rail to hold on to for safety purposes. The rear rail gives the operator something to lean against and something to hold on to in the event that he should need to. It is so designed and located that he can reach behind him with his left arm and hook the left arm around the safety rail and at the same time operate the motor car with his right arm and hand. In those cases when he is using both hands in the operation, he has the control levers to hold on to and prevent his falling off. (R. 18)

Mr. McDonald states his conclusionary opinion that the car is designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices are installed on the said motor car; and that the rearmost safety rail on the car is reasonably adequate from a safety engineering standpoint to provide a handhold or safety rail for the operator to hold on to in order to prevent himself from being thrown from the car. (R. 19)

Neither the Conner nor McDonald affidavit explains why the rear safety rail does not extend the full width of the car as in gang cars, nor is there any mention of why there are no side safety rails. Neither affidavit negates the necessity of having a seat belt for the safety of the operator, and there is no mention of seat belts or similar safety devices at all.

On the foregoing evidence, the First District Court of Appeal affirmed a summary final judgment for the railroad,

entered prior to trial, in a per curiam opinion. The Supreme Court of Florida denied certiorari with one justice dissenting.

FEDERAL QUESTION RAISED

The complaint and demand for jury trial, (R. 1-4); and opinion on appeal (R. 71), citing an F.E.L.A. case, all show petitioner's repeated and continuous assertion of his rights under the F.E.L.A.

REASONS FOR GRANTING WRIT

Petitioner urges this Court to grant this petition for a writ of certiorari to the District Court of Appeal of Florida, First District, for the following reasons:

1. The decision below is in conflict with this Court's decisions in *Rogers vs. Missouri Pacific R. Co.*, 352 U.S. 500; *Wilkerson vs. McCarthy* 336 U.S. 52; *Shulz vs. Pennsylvania R. Co.*, 350 U.S. 523; and numerous other decisions of this Court holding that in F.E.L.A. cases "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought".

The present record upon which the Florida courts held as a matter of law that employer negligence played no part in producing the injury to petitioner consists of the deposition of petitioner to which are attached four photographs of the motorcar, and the two opinion affidavits submitted by the defendant. The opinion testimony contained in both affidavits is obviously biased. Even granting this, however, the Conner affidavit contains no opinion that the motorcar was

safe, or had sufficient safety devices on it to prevent the operator from falling off, or that the railroad had exercised reasonable care in furnishing a safe place on which to work.

In his affidavit Mr. McDonald says that the car was designed in accordance with well-accepted and tested safety principles, and although he goes into more elaboration on the physical equipment found on the car and the uses thereof, he ends his opinion with the net conclusion that all reasonable safety devices are installed on the car. Neither he nor Mr. Conner attempt to explain or even mention the absence of side safety rails, the absence of seat belts and other similar safety measures, or why the back handrail on the inspection car extends only a portion of the width of the car, whereas the front rail extends the whole width, and on gang cars both rails extend the whole width.

In direct conflict with McDonald's statement that the rear safety rail is suitably placed for the operator to hold on to in case of being thrown off, plaintiff, when asked if he had hold of the back rail at the time of the impact, stated that he could not reach back there because it was too far back. He further stated that he had bruises on both of his hands after the accident occurred.

On the basis of biased and inconclusive opinion testimony and in the face of directly conflicting statements by plaintiff, the Florida courts have held as a matter of law that the railroad was not negligent and that the employee should be deprived of his right to jury trial.

As far back as 1897 in considering the conclusive nature of expert testimony, this court said ". . . the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which

requires them to surrender their judgment, or to give a controlling influence to the opinion of scientific witnesses . . ." *The Conqueror* 166 U.S. 110 at 133.

As *Wilkerson vs. McCarthy* held at 336 U.S. 57:

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

Had this case been submitted to a jury, the jury could certainly have inferred from plaintiff's statements concerning his inability to reach the back hand rail and the fact of his having bruises on both hands that there were not sufficient safety devices on the car. And in accepting plaintiff's testimony and inferences therefrom, the jury likewise could have disregarded the wholly conclusionary opinions of obviously biased witnesses.

2. The Florida courts have decided important questions regarding the concept of negligence under the F.E.L.A., contrary to the decisions of this Court. Since the only basis for the court's holding was the opinion testimony contained in the affidavits, the Florida court has determined that one man's biased opinion that the car "is designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices are installed on said motorcar . . ." is sufficient to completely negate negligence on the part of the railroad. The refusal to allow a jury to find negligence "because everything was done upon sound and accepted engineering principles" is in direct conflict with the federal law. E.g., *Texas & P. R. Co. vs Behymer*, 189 U.S. 468; *Terminal R.*

Ass'n of St. Louis vs. Schorb (C.A. 8, 1945), 151 F. 2d 361, cert. den. 326 U.S. 786. As these cases hold, the jury and not the railroad sets the standard of care.

3. The decision below, if permitted to stand, will materially frustrate the Congressional intent to afford injured railroad employees rights under the F.E.L.A. The Florida opinion prevents injured employees from going to a jury and proving negligence by proving that the railroads could, with relative simplicity, have provided them with safer working conditions. In the instant case such working conditions would consist of safety devices such as side rails, a back handrail which extended the entire width of the car, and a seat belt with which to hold the operator in place so that he would not fall off the side of the car if it became derailed.

In this modern day and age of scientific endeavor, the public at large has finally realized that seat belts, if not shoulder straps, should be mandatory in automobiles. Congress has seen fit to legislate to this effect. See *National Traffic and Motor Vehicle Safety Act of 1966*, Public Law 89-563; Title 23, U.S.C. Chapter 2, and Motor Vehicle Safety Standard No. 208 thereunder, which requires that seat belts be installed in each passenger car seat position. In spite of all the public awareness and discussion upon the excellent safety features of seat belts in automobiles, the Florida courts have held as a matter of law that the absence of seat belts for the operator of a motor inspection car constitutes no evidence of negligence on the part of the railroad. It is respectfully submitted that the Florida courts are backward in taking this position in refusing to allow a jury to determine if negligence is created, and this Court has, on other occasions, reversed the Florida courts for similar faulty reasoning. E.g., *Strickland vs. Seaboard Air Line Railroad Co.*, 350 U.S. 893; *Conner vs. Butler*, 361 U.S. 29.

An illustrative F.E.L.A. case concerning negligence and proximate cause for failure to equip motor vehicles with seat belts is *Mortensen vs. Southern Pacific Co.*, 245 C.A. 2d 241; 53 Cal. Rptr. 851, 1966. Plaintiff's testate, while driving a pickup truck owned by the defendant railroad in the course of his employment, was rear-ended by a car whose driver was intoxicated. The truck rolled over several times and the decedent was thrown from the car, sustaining injuries which resulted in his death. The truck was not equipped with seat belts and at the trial there was various testimony as to the use of seat belts and the chance of survival of a person so protected by one. At the close of the plaintiff's case the defendant's motion for nonsuit was granted. The California appellate court quoted from several U.S. Supreme Court F.E.L.A. cases, saying that Federal decisional law governs in determining whether the evidence requires submission to the jury. The court correctly stated that under the Federal authority, the evidence and inferences which might reasonably be drawn therefrom presented a jury question as to the railroad's negligence in failing to provide seat belts.

4. The decision below is clearly wrong and denies an injured railroad employee his right to trial by jury to which he is clearly entitled under federal law.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

James F. Lang
and
William N. Avera
P.O. Drawer "O"
Gainesville, Florida

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Certiorari has been furnished to John S. Cox, 630 American Heritage Life Building, Jacksonville, Florida, 32202, Attorney for the Respondent SEABOARD AIR LINE RAILROAD by U. S. Mail this 18th day of July, A. D. 1968.

.....

James F. Lang

Attorney for Petitioner

APPENDIX A

Clifford H. RAY, Appellant,

v.

SEABOARD AIR LINE RAILROAD COMPANY, Appellee.

No. J-88.

District Court of Appeal of Florida.
First District.

Dec. 21, 1967.

Rehearing Denied Jan. 25, 1968.

Appeal from Circuit Court, Alachua County; John A. H. Murphree, Judge.

James F. Lang, of Chandler, O'Neal, Carlisle, Avera & Gray, Gainesville, for appellant.

Cox & Webb, Jacksonville, and Clayton, Arnow, Duncan, Johnston, Clayton & Quincey, Gainesville, for appellee.

PER CURIAM.

This cause having been orally argued before the court, the briefs and record on appeal having been read and given full consideration, and appellant having failed to demonstrate reversible error, the judgment of the lower court hereby appealed is affirmed. See Seaboard Air Line Railroad Company v. Gentry (Fla. 1950), 46 So.2d 485; Holl v. Talcott (Fla. 1966), 191 So.2d 40.

WIGGINTON, C. J., and CARROLL, DONALD and RAWLS, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1968
FRIDAY, MAY 3, 1968

CLIFFORD H. RAY,

Petitioner,

vs.

SEABOARD AIRLINE RAILROAD COMPANY, etc.,

Respondent.

CASE No. 37,226

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CALDWELL, C. J., ROBERTS, ERVIN and ADAMS, JJ., concur; DREW, J., dissents

APPENDIX C

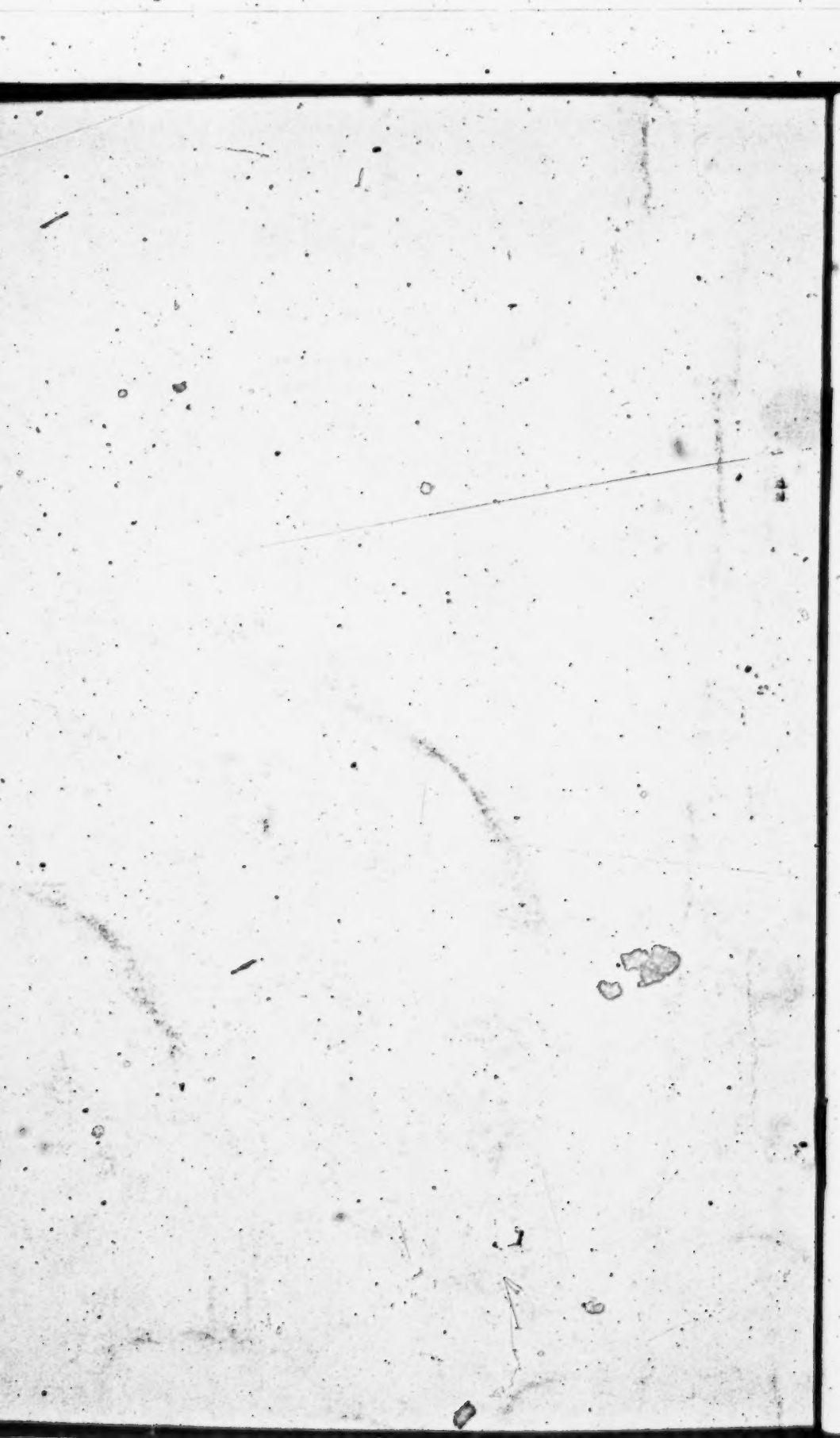
STATUTE INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. Section 51, provides:

51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.



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SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

On Petition For Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1968

No. 314

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SEABOARD AIR LINE RAILROAD COMPANY,
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On Petition For Writ of Certiorari to the District Court of Appeal of Florida, First District

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the First District Court of Appeal is reported at 205 So.2d 537 and is set out in Appendix A of the Petition for Writ of Certiorari. The order of the Supreme Court of Florida denying certiorari, entered on May 3, 1968, is yet unreported but is set out in Appendix B of the Petition.

STATEMENT OF THE CASE

As stated in the Petitioner's Statement of the Case in his Petition, this is a case under the Federal Employers' Liability Act, Section 51, et seq., Title 45, United States Code. The allegations in the original Complaint designed to allege a cause of action under the Federal Safety Appliance Act, Title 45, United States Code, were dismissed or stricken by the trial Court (R. 5-6) upon proper motion and no complaint has been made or question raised in any appellate proceeding, including this one, as to the correctness of such order.

The remaining allegations of negligence on the part of the Respondent were:

> 1. That the Defendant negligently furnished the Plaintiff a dangerous and unsafe place at or upon which to work (the motor car involved).
>
> (Par. 1(a), Count II of Complaint; R. 3)

> 2. That the Defendant negligently failed to provide the Plaintiff with a reasonably safe place to work and with reasonably safe working conditions (by providing him with the motor car upon which he was working at the time of the accident).
>
> (Par. 1(b), Count II of Complaint, R. 3)

> 3. That the Defendant negligently failed to provide the Plaintiff with a reasonably safe place within which to work (a reasonably safe motor car) and with reasonably sufficient and proper equipment with which to perform his duties (Again, the motor car in question).
>
> (Par. 1(c), Count II of Complaint, R. 3)

> 4. That the Defendant negligently failed to provide the Plaintiff with a motor car which contained a handrail, bar, handhold, grabiron, or any other reasonable and safe means by which Plaintiff could retain his position and hold to or secure his position upon the motor car in the event of a sudden movement or detailment which might cause the Plaintiff to fall from said motor car.
>
> (Par. 1(d), Count II of Complaint, R. 3)

By its Answer (R. 7-8) the Respondent denied that it was guilty of any negligence alleged in the Complaint. The Answer contained a separate defense that the accident was caused solely by the negligence of the Petitioner and a further defense that the Petitioner's negligence contributed to the accident and his alleged injuries and that his right to recovery should, accordingly, be reduced thereby.

The procedural aspects of the case after the filing of the Answer are that when Respondent filed and served its Motion For Summary Judgment on April 12, 1967 (R. 9) it also attached to that Motion and filed and served upon the Petitioner the Affidavits of L. E. Conner and Neil G. McDonald, (R. 11-19). *No opposing affidavits* were filed by Petitioner and the Motion for Summary Judgment was heard by the trial Court on May 10, 1967, upon which date the trial Court entered its Summary Final Judgment in favor of Respondent (R. 69-70). It is that judgment which Petitioner seeks to have reversed.

STATEMENT OF THE FACTS

On May 3, 1962, the Petitioner was employed as a Section Foreman for the Seaboard Railroad (R. 27). Four men were under his supervision at that time and he was operating out of Waldo, Florida, charged with the duty of inspecting and maintaining trackage from Starke, Florida, to Lochloosa, Florida (R. 27-28). Prior to becoming a Section Foreman he had been Main Gang Foreman operating in the same area and he was very familiar with the trackage in the Waldo area (R. 28).

On the morning of May 3, 1967, the Petitioner went to work at 8:00 o'clock A.M. and met his men at the car house located adjacent to the depot in Waldo. On that morning he was going to use a regular inspection motor car, taking two of his men with him, and inspect the main line tracks running South from Waldo, Florida. The motor car was placed on the tracks headed South and Petitioner positioned himself on the very rear of the car on the left-hand, or east side, in order to operate the motor car, with his two helpers seated on the front of the motor car, one on the east side and one on the west side, seated sideways. Petitioner was entirely occupied with operating the motor car and was depending upon his two helpers on the front end of the motor car to actually visually inspect the tracks, tie rails, bolts, etc., as the motor car moved southward over the tracks (R. 29-33).

The motor car which had been furnished to Petitioner for his use and which was being used by him that morning was a Fairmont Model M19AA motor car manufactured by Fairmont Railway Motors, Inc. of Fairmont, Minnesota (R. 12, 17, 65-68), and is shown in the four photographs attached to Petitioner's deposition (R. 65-68).

The maximum speed of the motor car was 45 miles per hour and the throttle, gear and brake control levers were located just in front of the operator's seat position and designed for hand operation (R. 18, 30, 33-35, 65-68).

The normal speed Petitioner usually traveled on the motor car while inspecting tracks in the area where this accident happened was 15 or 20 miles per hour (R. 34), but at the time the accident happened Petitioner was operating the motor car at less than 15 miles per hour (R. 35).

Petitioner and his two section laborers left the car house at Waldo traveling south on the motor car at approximately 8:15 A.M. on May 3, 1962 (R. 39). The weather was clear and there was no smoke, fog or haze to obstruct visibility (R. 43).

Just after leaving the car house and just prior to the accident the Petitioner had slowed the motor car down as it approached a grade crossing in Waldo, but didn't stop (R. 33-34). After traversing the crossing the Petitioner engaged the forward gear, "opened up the gas" and was increasing his forward speed (R. 34). After traveling 150 to 200 feet south of the crossing the Petitioner felt the motor car shudder, immediately looked down through an opening surrounding his gear and throttle controls, and saw that the motor car had hit a dog (R. 34-35). At that time the motor car was on a curve with the high banked side to the right, or west, and the low side to the left, or east. Immediately after impact with the dog the motor car partially derailed to the west or high side, the Petitioner fell off and was injured (R. 34-37, 39, 41).

The motor car traveled about 60 feet after the impact and came to a stop upright. The two section laborers who were riding the front end of the motor car (one on either side)

rode the car to a standstill and were not thrown off (R. 36, 40, 63).

At the time Petitioner felt the motor car shudder he had his right hand on the brake lever and was either reaching for the throttle with his left hand or had his left hand on the gear lever (R. 37-38).

Petitioner never saw the dog prior to the impact (R. 35). There were no trees on the railroad right-of-way in the area to obstruct visibility (R. 41), and the roadbed in that area was 25 feet wide, with a clear sloping shoulder of 8 to 10 feet wide on either side of the tracks (R. 31-32).

The particular motor car which was being used on the morning of the accident is shown in the four photographs attached to Petitioner's deposition (R. 65-68) and it had been bought new by the railroad from Fairmont Railway Motors, Inc. of Fairmont, Minnesota, on May 8, 1959 (R. 12, 17). After it had been inspected and the rail sweeps attached just forward of the front wheels it was shipped on August 6, 1959, from Hamlet, North Carolina, to Waldo, Florida, for use by the Section Foreman stationed at Waldo (R. 12). Nothing further was added to or taken from said motor car after its arrival in Waldo, with the exception of the addition of the two "sanders" on the front end of the car (R. 12 65-68).

The motor car had been designed by its manufacturer and used by the railroad as a track inspection vehicle and for the purpose of transporting two or three section laborers as a light section car, or for both purposes (R. 12)

As of May 3, 1962, the railroad had a total of 25 motor cars in use over its system identical in all respects to the motor car which Petitioner was using that morning; and the railroad had a total of 225 motor cars in use on its system

as of May 3, 1962, with the same basic design as the motor car being used on that date by the Petitioner, having the same dimensions, equipped with the same safety rails on front and rear, and operated in the same manner (R. 12-13).

Mr. L. E. Connor, the Supervisor of Work Equipment for the railroad, whose duty it was to select and purchase all work equipment (including motor cars) for use over Respondent's railroad system (R. 11) identified the four photographs attached to Petitioner's deposition (R. 65-68) as depicting the identical motor car which Petitioner was using on the morning of May 3, 1962 (R. 12) and the Petitioner himself identified such photographs as either the identical car he was using or one similar in design (R. 58-62).

For the past 20 years there have been only five manufacturing concerns furnishing and manufacturing motor cars for use by railroads and over that period of time Mr. Connor, based upon personal examinations and inspections, has found that the motor cars manufactured by Fairmont Motors, Inc. (the concern from which this particular motor car was purchased) are the best designed and most efficient motor cars produced and available to the railroads operating in the United States of America.

The registered mechanical engineer, Mr. Neil J. McDonald, who was instrumental in and who personally participated in the engineering studies leading to the design and ultimate manufacture of this particular motor car, executed an affidavit which was filed by Respondent in support of its Motion for Summary Judgment (R. 15-19). Among other factors or considerations entering into the engineering design studies on this particular motor car was the location, size and design of the front and rear safety rails, so as to provide safety for the operator and passengers of the motor car and

yet not interfere with the load carrying capacity of the car, or with its operation (R. 17). Said motor car was designed in accordance with and in conformity to well-accepted and tried and tested sound engineering design principals; in accordance with accepted and standard safety principles; and in accordance with the requirements of the various railroads of the United States for whom said Motor car was designed (R. 17). The engineering design of the motor car, including the placement of both the forward and rearward safety rails, meets all the requirements of the Interstate Commerce Commission and any other regulatory Board or Body with reference to safety devices or safety precautions to be incorporated in the engineering design of motor cars intended for track inspection and limited gang transport purposes.

Since 1954, Fairmont Railway Motors, Inc. has built and sold to every major railroad in the United States, Canada and many foreign countries approximately 900 motor cars identical in all respects to the one which Petitioner was using at the time of the accident and approximately 3,000 additional motor cars with practically identical design insofar as the placement of the fore and aft safety rails are concerned (R. 18).

Mr. McDonald testified, by affidavit, that the rear safety rail on the motor car which Petitioner was using at the time of the accident is located directly behind the place where the operator sits and is designed to give the operator something to lean back against and something to hold onto in the event it should become necessary for him to hold onto said safety rail (R. 18). Mr. McDonald's further testimony was that the rear safety rail was so designed and located that an operator can reach behind him with his left arm and hook his left arm around the safety rail and, at the same time, operate the motor car with his right arm and hand;

or, in those cases when the operator of the motor car is using both hands on the operational levers, the operator has the levers (which are constructed of spring steel and are equipped with cast aluminum handles for a firm hand hold) to hold onto and thus prevent his falling or being thrown from the machine (R. 18).

Mr. McDonald, as an expert on engineering design and principles, and with especial reference to engineering design and principles on railroad motor cars, stated the expert opinion that this particular motor car which Petitioner had been furnished by the Respondent and which Petitioner was using at the time of the accident had been designed and constructed upon sound and accepted engineering principles; that all *reasonable* safety devices had been installed on said motor car; and that the rearmost safety rail on said motor car is reasonably adequate from a safety engineering standpoint to provide a handhold or handrail, or safety rail for the operator of such motor car to hold onto in order to prevent himself from being thrown from said motor car (R. 19).

No affidavits were filed by Petitioner in opposition to the affidavits of Mr. Connor and Mr. McDonald, and upon this state of facts and proofs the trial Court entered Summary Final Judgment in favor of the Respondent.

QUESTION PRESENTED

Only one point or question is involved here, and Respondent feels that it should be stated as follows:

UPON THE STATE OF THE RECORD AS IT EXISTED AT THE TIME OF THE SUMMARY JUDGMENT HEARING DID THE RESPONDENT MEET THE BURDEN OF CONCLUSIVELY PROVING THAT THERE DOES NOT EXIST GENUINE ISSUES OF MATERIAL FACT TO BE TRIED?

ARGUMENT

1. The first considering the allegations of negligence against Respondent in this case, as set out in our preceding Statement Of The Case, the sole allegation, though pleaded in various phraseology, was Respondent's alleged failure to exercise reasonable care in furnishing a reasonably safe motor car with which and upon which Petitioner was to perform his work.

For the purposes of its Summary Judgment motion, Respondent assumed the burden of proving that it did, in fact, exercise reasonable care in selecting and furnishing to Petitioner this particular motor car and that, moreover, said motor car was indeed a reasonably safe and efficient piece of equipment upon which and with which to work.

As stated by the Florida Supreme Court in the case of *Holl v. Talcott*, 191 So. 2d 40, which the lower Court cited in its opinion (Appendix A, Petition) at page 47:

> "Since the material issues in any cause are those which are relevant to the issues made by the pleadings, it follows that the movant's burden is limited to making the required showing *only as to those issues. Therefore, the movant may meet his burden by showing conclusively that he is not guilty of the negligence charged against him.*" (Emphasis supplied).

The pleadings, deposition of the Petitioner, photographs and affidavits on file clearly show that the Respondent in this case did, in fact, conclusively show that it was not guilty of the negligence charged against it.

While realizing that the quantum of proof necessary on the part of a plaintiff in an action under the Federal Employ-

ers Liability Act (Section 51, et seq., Title 45 USC) is not great, still the Act itself is still predicated upon negligence. The many cases construing the Act consistently hold that the Railroad employer is not an *insuror* of the safety of its employees. This is clearly stated in this Court's holding in the case of *Seaboard Air Line Railroad Company v. Horton*, 233 U.S. 492, 58 L. Ed. 1062, at 233 U.S. 501:

> ". . . . an employer is not a guarantor of the safety of the place of work or the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workman."

See also *Burch v. Reading Company*, 240 F.2d 574, cert. den. 353 U.S. 965, 1 L.Ed.2d 914; *Atlantic Coast Line Railroad Company v. Dixon*, 189 F.2d 525; and *Seaboard Air Line Railroad Company v. Gentry*, 46 So.2d 485.

Bearing in mind Petitioner's allegation predicated upon alleged failure to use reasonable care in furnishing to him a reasonably safe motor car upon which and with which to work, the next question is: Just what was the Railroad's duty in the case at bar? This duty was clearly stated in this Court's opinion in the case of *Chicago & Northwestern Railway Company v. Bower*, 241 U.S. 470, 60 L.Ed 1107, wherein Mr. Justice Pitney, speaking for this Court, stated at 241 U.S. 473-474:

> "The rule of law is: The employer is under a duty to exercise *ordinary* care to supply machinery and appliances *reasonably* safe and suitable for the use of the employee, but is *not* required to furnish the *latest*,

> *best*, and *safest* appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable."
> (emphasis supplied)

See also *Patton v. Texas and Pacific Railway Company*, 179 U.S. 658, 45 L. Ed 361. This remains the law in relation to the Railroad's duty and has now been enlarged by either legislative act or judicial decree.

It should also be noted that, contrary to the inferences which Petitioner would attempt to interject in his brief, neither this Court, nor any other has ever ruled that a Court is precluded in an F.E.L.A. case from granting Summary Judgment to a railroad simply because of an allegation of negligence in the Complaint. In the case of *Dessi v. Pennsylvania Railroad Company*, 251 F.2d 149, cert. den. 356 U.S. 967, 2 L.Ed. 2d 1073, citing a decision of this Court in *Rogers v. Missouri Pacific Company*, 352 U.S. 500, 1 L. Ed. 2d 493, this Court pointed out that a plaintiff in an F.E.L.A. case *cannot* carry his burden of proof without evidence that the role of the defendant's negligence is a real one, and stated further that this Court's decision in the *Rogers* case is a persuasive indication that there has been no departure from the familiar and normal requirement of Federal jurisprudence that proof of probative facts from which negligence and causal relationship may reasonably be inferred *must* be presented. Accordingly, the historical function of the trial judge in screening the evidence and pleadings before him on a Summary Judgment motion to ascertain whether there is enough to persuade reasonable minds that *some* negligence of the employer contributed to the plaintiff's injury applies in F.E.L.A. cases, as in others; all as evidenced by numerous cases denying the claim of a plaintiff in an F.E.L.A. case as a matter of law. The possibility alone that in an F.E.L.A.

case a jury might *disbelieve* testimony or probative facts presented to the Court on Summary Judgment motion does not make the case submissible to it. See *Moore v. Chesapeake & Ohio Railway Company,* 340 U.S. 573, 95 L. Ed 547; *Eckenrode v. Pennsylvania Railroad Company,* 335 U.S. 329, 93 L. Ed 41; *Brady v. Southern Railway Company,* 320 U.S. 476, 88 L. Ed. 239.

Thus, in order to entitle it to a summary judgment in this case, the Respondent railroad's burden was the burden of showing conclusively that it *did,* in fact exercise reasonable care in selecting and furnishing to Petitioner a *reasonably* safe and efficient motor car upon which to work and with which to perform his duties.

This burden was met and carried by the affidavit of Mr. L. E. Conner, the Railorad's officer or agent charged with the responsibility of selecting and arranging for the purchase of such motor cars. This affidavit (R. 11-14) conclusively shows that this particular motor car was not just arbitrarily purchased and furnished to Petitioner without careful consideration being given to its safety and suitability for the work to be performed. To the contrary, the affidavit clearly and conclusively shows that *more* than reasonable care was exercised in its selection. Of the five manufacturing concerns in the United States producing motor cars over the past twenty years, the manufacturing concern which produced this particular motor car has manufactured the majority of *all* motor cars used by *every* major railroad in the United States (R. 13). Mr. Conner personally examined and inspected the motor cars produced by all five of the United States manufacturers over the past twenty years, and found upon this personal examination and inspection that the motor cars (including the particular model involved in this accident) manufactured by Fairmont Railway Motors, Inc., are the best

designed and most efficient motor cars produced and available to the railroads operating in the United States. A total of twenty-five motor cars of this same model and identical in all respects were purchased and placed in use on Respondent's railway system, and at least two hundred more cars of the same design, insofar as the location of safety features is concerned, were also purchased and placed in use on Respondent's railway system (R. 12-13).

Thus the Respondent has shown conclusively that in selecting and furnishing to the Petitioner this particular motor car, it selected the best designed, most efficient and safest piece of equipment available to it in the United States. *No* affidavits were presented by Petitioner contradicting this, nor did any other evidence before the trial Court at the time of the summary judgment hearing contradict the reasonable care which the Respondent exercised in selecting and furnishing this piece of equipment.

Carrying its burden a bit further, and perhaps beyond the actual requirements imposed upon it by law, Respondent proceeded further to show conclusively that the motor car which it had selected and furnished to Petitioner for his use was, in fact, a reasonably safe piece of equipment upon which and with which to work.

This was done in the affidavit of Mr. Neil J. McDonald (R. 15-19). Mr. McDonald is a well qualified mechnical engineer, not only by way of formal education but also by practical training over a span of thirty years, thereby entitling him to testify as an expert in the field of engineering design and principles, with special reference to railway motor cars (R. 15-17). He personally participated in the engineering studies leading to the design and ultimate manufacture of the motor car which was involved in this accident. Among

other considerations entering into the design of the motor car was the best place on the car for the location of front and rear safety rails, so as to provide safety for the operator and passengers of the motor car and yet not interfere with its load carrying capacity or operation. Approximately 900 identical motor cars have been built and furnished to every major railroad in the United States, Canada and many foreign countries, and approximately 3,000 similar cars with practically identical design, insofar as the placement of safety rails is concerned, have been manufactured and sold to all such major railroads. The rear safety rail was specifically designed and located so as to not only afford the operator a back rest, but to give him something to hold on to and to hook his left arm around when he operates the motor car with his right arm and hand. The hand operational levers are themselves designed with safety in mind, being constructed of heavy spring steel and cast aluminum, with cast aluminum handles providing a firm hand-hold for the operator in the event both his hands are occupied with the manipulation of the controls (R. 18). The design of this motor car, including the placement of both the front and rear safety rails, meets all of the requirements of the Interstate Commerce Commission and all other regulatory boards and bodies with reference to safety devices and safety precautions to be incorporated in the engineering design of motor cars for track inspection purposes (R. 19).

Mr. McDonald's expert opinion, which he was certainly qualified to give, is that this particular motor car was designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices were installed on the motor car; and that the rear safety rail on the motor car is reasonably adequate from a safety engineering standpoint to provide a handhold, or a handrail or safety rail for the operator of such motor car to hold onto in order to

prevent himself from being thrown from said motor car (R. 19).

Again, *no* affidavits were presented by Petitioner contradicting such testimony, nor is there any contradictory testimony, or even contradictory inference, in the record.

Petitioner, in his brief, contends that the conclusionary and fragmentary statement in his deposition, to-wit: "Can't reach back there, in other words, too far back," (R. 37) is sufficient to contradict the affadivit testimony of both Mr. L. E. Conner and Mr. Neal J. McDonald, or at least to raise some sort of inference which would require the submittal of this case to a jury's consideration.

The fallacy of this argument is readily apparent when the deposition of the Petitioner is read. Petitioner places himself on the very rear left-hand side of the motor car, where the motor car operator sits (R. 32). He further testified definitely that at the time of the accident and immediately prior thereto *both* his right hand and his left hand were occupied in operating the controls of the motor car (R. 37-38). It is patently obvious and apparent that Petitioner never made any effort or attempt to reach the safety rail with his left hand, or with either hand, at the time and place of this accident. Thus, his one-line statement, "Can't reach back there, in other words, too far back," is nothing more than a self-serving type of conclusion and opinion, which has no probative value whatsoever.

2. Petitioner also urges in his Petition, and for the *first* time in this litigation, that the decision below "if permitted to stand, will materially frustrate the Congressional intent to afford injured railroad employees rights under the F.E.L.A." in that the decision is tantamount to holding "as a matter

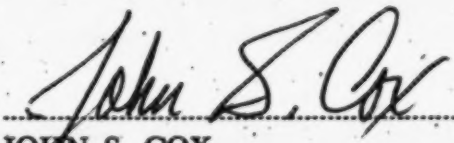
of law that the absence of *seat belts* for the operator of a motor inspection car constitutes no evidence of negligence on the part of the railroad". He cites the National Traffic and Motor Vehicle Safety Act of 1966, Public Law 89-563; Title 23, U.S.C. Chapter 2, and Motor Vehicle Safety Standard No. 208 (neither of which apply to any vehicles other than motor vehicles traveling on public highways) in support of his newly concocted contention that seat belts are reasonably required features on railroad motor cars. Respondent would point out that *never* have seat belts been required on any vehicle other than *motor vehicles traveling upon public highways* by either Congressional legislation, judicial decree, the Interstate Commerce Commission or any other regulatory body.

Respondent would also point out that the issue of *seat belts* has never heretofore been raised by Petitioner in *any* of the lower Courts by way of pleading, testimony, affidavit or otherwise. This is a completely new and novel theory raised in this Honorable Court rather tardily *and for the first time* in this rather extended litigation. Petitioner had ample opportunity to attempt the raising of this purported issue in the trial Court prior to hearing by the trial judge on Respondent's Motion For Summary Judgment, but completely failed to do so. Thereupon, Petitioner cannot create new issues by argument before the United States Supreme Court which were not presented to the trial Court at the time Summary Judgment was entered. Such issues, not having been timely submitted in the lower Court, cannot be reviewed on appellate proceedings and are waived. See *Carr* v *Corning*, 182 F 2d 14; *River Plate And Brazil Conferences* v *Pressed Steel Car Company, Inc.*, 227 F 2d 60; *Atlas* v *Eastern Air Lines, Incorporated*, 311 F 2d 156; *Doff* v *Brunswick Corporation*, 372 F 2d 801.

CONCLUSION

The Respondent has adequately carried its burden in the trial Court of conclusively showing the absence of any genuine triable issue of fact, and the Petitioner completely failed to come forward and present to the trial Court any sufficient evidence showing the existence of a genuine triable issue of material fact.

Accordingly, the Respondent respectfully submits that the entry by the trial Court of Summary Final Judgment was correct and that the Petition For Writ of Certiorari filed in this Court should be denied.



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that copy hereof has been furnished to James F. Lang, Esquire and William N. Avera, Esquire, P. O. Drawer "O", Gainesville, Florida, Attorneys for Petitioner, Clifford H. Ray, by U. S. Mail this 28th day of August, A. D. 1968.

John S. Cox

John S. Cox
Attorney for Respondent